Supreme Court U.S.
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No. 95-1170

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

WILLIAM EVANS,

Petitioner,

V.

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does Title VII protect an employee's opposition to employer actions required by a federal court desegregation order?

2. Is an employment retaliation claim brought under 42 U.S.C. § 1981 subject to the same analysis as a Title VII employment retaliation claim?

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COUNTERSTATEMENT OF THE CASE

A. Background

On or about August 30, 1988, plaintiff William Evans, an African-American, was employed by the School District of Kansas City, Missouri (the "School District") as a "probationary" music teacher assigned to Southeast High School, one of nine high schools in the School District. Evans was responsible for teaching band and choir classes.

Pursuant to statutes applicable to Missouri public schools, teachers are classified as probationary until they have completed five years of teaching and have then been employed for a sixth consecutive year, at which point they become "permanent," or tenured, teachers. Probationary teachers in Missouri public schools receive one-year contracts, subject to annual renewal; permanent teachers' contracts renew automatically each year.

At the time Evans was hired, the School District was subject to a desegregation order entered by the

Federal District Court for the Western District of Missouri in Jenkins v. State of Missouri, No. 77-0420-CV-W-4. The initial remedial order in Jenkins, reported at 639 F. Supp. 19, was entered in 1985. A subsequent order, entered November 12, 1986, approved an extensive program of "magnet schools" as a part of the desegregation remedy.

At the time the remedial desegregation orders were entered, Southeast High School enrolled a more than 90 percent African-American student body drawn from its surrounding racially segregated geographic area. Under the desegregation plan, Southeast High was to become a magnet school, intended to attract a racially diverse voluntary student enrollment from a broad geographic area. Under the plan, teachers and other staff of each magnet school were to participate in recruiting voluntary student enrollment which would meet established goals of racial diversity at each school. Schools which were predominately non-minority were to concentrate on

recruitment of minority students; schools which were predominately minority were to concentrate on recruitment of non-minority enrollment.

In January of 1991, during Evans' third year as a probationary teacher, a new principal, Dr. Curtis Cooper, was hired to implement the magnet programs at Southeast High School. Cooper was hired on the basis of his background and experience in leading magnet school programs.

Consistent with the requirements of the desegregation plan, Cooper planned to implement an educational program related to the magnet themes, to improve academic achievement at the school, and to recruit racially diverse student enrollment from a broad geographic area.

Realizing that some members of the school's staff opposed the changes required under the desegregation order, Cooper arranged for a special staff meeting to be

held in February of 1991, soon after he assumed his position. At this first meeting with the entire staff of the school, Cooper sought to communicate his vision and goals in implementing the desegregation plan at Southeast High. He specifically addressed the need to recruit non-minority students to achieve the goals of desegregation set out in the plan, and the plan's expectation that the entire staff of the school would participate in non-minority student recruitment.

All members of the staff were given the opportunity to respond to Cooper's remarks. Petitioner Evans used the opportunity to criticize Cooper's proposals, including the focus on non-minority recruitment. Evans charged that Cooper's proposals totally disregarded the current 98 percent black student population attending the school. Evans referred to the plan as "nothing more than a tool to further alienate the student population from its rich and historic culture."

During the two and one-half years prior to Cooper having assumed his duties as principal at Southeast High, three scheduled evaluations of Evans had been performed, one by a previous principal of Southeast High School, one by a coordinator of instruction, and one by an assistant principal. Although each of these evaluators had recommended Evans' continued employment as a probationary teacher, evaluations for the second two years were below those of the first year, the scores were in the mid-range required for meeting performance standards, and each evaluation included comments indicating need for improvement in Evans' teaching skills.

A part of Cooper's role as educational leader of Southwest High School was visiting classrooms to observe the quality of instruction. According to Cooper's testimony, he became concerned, based on his observations of Evans' classroom teaching, that students in Evans' band class were not engaging in musical

performance to the extent Cooper believed necessary for successful learning. Cooper testified that he had also become aware that under Evans' direction and instruction, the band's reputation was poor -- so poor that the band was not invited to perform for school activities.

Rather than relying solely on his own views of Evans teaching skills, Cooper contacted the School District's coordinator for performing arts, Dr. Irving Phillips, to assist in assessing the adequacy of Evans' classroom instruction. After classroom observation, Dr. Phillips found Evans' instruction to be seriously deficient, with no demonstrable evidence that music instruction was occurring in the classroom.

According to Cooper's testimony, this second opinion verified his view that Evans required help in improving his instructional performance. Cooper directed Evans to submit long-range and weekly lesson plans. Evans submitted a long-range plan, but refused to provide

short range plans, noting by memorandum to Cooper that he did not "feel obligated" to submit a weekly lesson plan, because such a directive had not been made to the entire staff.

Cooper advised Evans that he considered the refusal to submit weekly lesson plans insubordination. Evans thereafter requested a meeting of Cooper, Evans, and the School District's collective bargaining representative for teachers. The meeting was held in March of 1991. Cooper assessed Evans' manner at the meeting as disrespectful, considering it further evidence of insubordination.

Each spring, prior to an April 15 statutory deadline, building principals in the Kansas City School District are required to forward employment recommendations to the School District's central administration. In his 1991 report, Cooper recommended that Evans' contract as a probationary teacher not be renewed. This

recommendation was approved by the School District's central administration and forwarded to the school board. On or about April 11, 1991, the Board of Directors of the School District approved the administration's recommendation. Evans' contract was not renewed, and his employment terminated at the end of the 1990-91 contract year.

B. Proceedings Below

Evans filed an action in the Federal District Court for the Western District of Missouri, alleging that the School District subjected him to race discrimination and unlawful retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a); 42 U.S.C. § 1981; and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.010 et seq.. The retaliation claim was based on allegations that as a result of his criticism of Cooper's implementation of the magnet plan at Southeast, Evans was required to submit instructional lesson plans on a more frequent basis than

other teachers. Evans' race was alleged to be the basis for the School District's decision not to renew his contract. The State law and § 1981 claims were submitted to a jury and the Title VII claims reserved for ruling by the Court.

Evans testified that he believed he suffered employment retaliation because of his opposition to Cooper's plans to focus on recruitment of non-minority students, and his criticism of Cooper's reference to "Camelot" as the ideal for Southeast High School.

Following a four day trial and two days of deliberation, the jury found in favor of the School District on the race discrimination claims, and in favor of Evans on the retaliation claims. The District Court adopted the factual findings of the jury, ruled in favor of the School District on the claims of race discrimination in violation of Title VII, and ruled in favor of Evans on the claim of retaliation under Title VII. Evans was awarded a total of $25,002 in damages, and reinstatement to a teaching

position. Evans v. School Dist. of Kansas City, Mo., 861 F. Supp. 851 (W.D. Mo. 1994).

The School District appealed that portion of the judgment holding in favor of Evans on his claim of retaliation. On September 6, 1995, the United States Court of Appeals for the Eighth Circuit reversed, remanding the case to the district court with directions to dismiss the complaint. The Court of Appeals held that Evans' retaliation claim should have been dismissed as a matter of law, because he had failed to show a good faith reasonable belief that his employer had engaged in a discriminatory employment practice, an essential element of an employment retaliation claim brought under 42 U.S.C. § 2000e-3(a) or 42 U.S.C. § 1981.

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the Eighth Circuit correctly applied settled legal principles in holding that a retaliation claim under Title VII, Section 1981, or the Missouri Human Rights Act cannot be based on allegations of retaliation for opposing employer actions which could not reasonably be considered unlawful.

The requirement that an employee claiming retaliation show a reasonable belief that the employee was opposing unlawful employer actions applies to actions brought under Title VII, Section 1981, or the Missouri Human Rights Act. All actions Petitioner opposed were taken pursuant to desegregation orders entered by a federal district court. Petitioner was aware of the desegregation plan requirements, and could not reasonably have believed that the School District was acting

unlawfully in complying with the requirements of the court order. He therefore failed, as a matter of law, to establish one of the basic elements of an employment retaliation claim.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT CORRECTLY HELD THAT A CAUSE OF ACTION BROUGHT UNDER TITLE VII'S PROHIBITION AGAINST EMPLOYER RETALIATION REQUIRES A SHOWING OF A REASONABLE BELIEF THAT THE EMPLOYER ENGAGED IN ACTS MADE UNLAWFUL BY TITLE VII.

In an effort to obtain Supreme Court review, petitioner Evans has misstated the basic holding of the Eighth Circuit in dismissing Evans' Title VII retaliation claim.

The Eighth Circuit's decision on Evans' retaliation claim was based on the Court's conclusion that Evans had failed, as a matter of law, to establish the basic elements of an employment retaliation cause of action. The Court concluded that Evans had failed to demonstrate that he suffered retaliation as a result of having engaged in protected opposition to his employer's actions, in that he failed to allege or prove facts showing "a good faith

reasonable belief that his employer engaged in a discriminatory employment practice." (Petitioner's Appendix, at 5):

> Doctor Cooper's announced course of action with respect to the magnet school program reflected his intention to comply with the district court's desegregation order. Evans was aware of the desegregation order and magnet program, and thus he cannot avoid scrutiny of his claims by relying on an asserted reasonable belief that his allegations were justified. To the extent that Evans claims a belief that he and the rest of the staff would be required to discriminate, such a belief was simply unfounded and unreasonable in the light of the district court's sweeping desegregation order. Evans could not reasonably believe that the faculty would be excused from complying with a lawfully required directive.

It is well-settled law that Title VII protects an employee's opposition only to employment practices which the employee reasonably and in good faith believes violate Title VII. Sisco v. J.S. Alberici Const. Co., 655 F.2d 146, 150 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982); Meeks v. Computer Associates Intern., 15 F.3d 1013 (11th

Cir. 1994); Holden v. Owens-Illinois, Inc., 793 F.2d 745 (6th Cir. 1986), cert. denied, 107 S. Ct. 649; Crowley v. Prince George's County, Md., 890 F.2d 683 (4th Cir. 1989); Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1312 (6th Cir. 1989).

The conduct that Evans opposed consisted of the following statements made by Dr. Cooper in the February 1991 staff meeting at Southeast High School:

(1) Dr. Cooper spoke of the magnet plan and the need to recruit non-minority students to attend Southeast High School to achieve the desegregation objectives of the magnet plan. (Trial Transcript V. II, p. 111, l. 18; p. 112, ll. 1-15; V. I, p. 43, ll. 1-8).

(2) Dr. Cooper indicated that teachers were expected to assist the School District in attracting non-minority students. (Trial Transcript V. I, p. 44, ll. 10-22).

(3) Dr. Cooper made some reference to Southeast becoming "a realization of the fictionalized Camelot." (Def. Trial Ex. 25).

The Eighth Circuit was clearly correct in concluding that the genesis of Evans' claims lay not with any allegedly discriminatory employment practice, but rather with an allegation that a desegregation directive and Cooper's efforts to comply with it, disregarded the needs of the black student population of Southeast High School. The Court found that while Evans might disagree with the provisions of the federal court's desegregation order, he could not have reasonably believed that Principal Cooper's plans for complying with the order constituted a discriminatory employment practice. An employee's unreasonable belief that an employer's actions are discriminatory does not trigger protection of anti-retaliation laws. Sisco, 655 F.2d at 150; Booker, 879 F.2d at 1313.

Even if the jury believed, as it apparently did, that Principal Cooper's criticisms of Evans and requirements that Evans submit daily lesson plans resulted from anger

at Evans' opposition to Cooper's plans for implementing the magnet program at Southeast rather than from sincere concerns about Evans' need to improve his teaching methods, this did not establish the necessary elements of an employment retaliation claim. Principal Cooper's plans for implementing the desegregation plan were lawful. They were not in violation of any provision of Title VII, § 1981, or the Missouri Human Rights Act. Petitioner Evans' opposition to Cooper's actions was, therefore, not protected by Title VII, § 1981, or the Missouri Human Rights Act.

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT PLAINTIFF FAILED TO ESTABLISH AN EMPLOYMENT RETALIATION CLAIM UNDER 42 U.S.C. § 1981.

Petitioner again resorts to distortion of the Eighth Circuit opinion in an effort to establish error in the court's ruling that Evans failed to establish an employment

retaliation claim under 42 U.S.C. § 1981. In this instance, Evans claims that the decision below "holds that protection under 42 U.S.C. § 1981 does not extend to a Black employee complaining of racial discrimination directed at others who are not fellow employees."

What the Eighth Circuit decision in fact does is hold that Evans' § 1981 retaliation claim fails because it is subject to the same analysis as Title VII claims. (Petitioner's App. 6). The Court states its conclusion that Evans failed to satisfy the requirements of § 1981 in regard to his complaints of employment discrimination "in the same manner that he has failed to satisfy Title VII and the Missouri Human Rights Act," because he did not allege or prove facts showing he had engaged in protected activity in that there was no basis for a reasonable belief that actions had been taken by his employer which were unlawful under Title VII or § 1981. The court correctly held that the elements of a claim of employment

discrimination under Title VII and § 1981 are identical. See Patteson v. McLean Credit Union, 491 U.S. 164, 186 (1989); Anderson v. Douglas & Lowanson Co., Inc., 26 F.3d 1277, 1284 M.7 (5th Cir. 1994); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981); Sweeney v. City of Ladue, 25 F.3d 702, 703 (8th Cir. 1994).

The opinion then discusses Evans' argument "that section 1981 is broader and encompasses actions that do not fall within the rubric of the employment relationship." (Petitioner's App. 6, emphasis added.) This discussion notes that to the extent Evans is attempting to assert a right to bring a § 1981 claim on the basis of any alleged damage other than the damage he claims to have suffered as an employee -- a claim other than the failed employment retaliation claim -- he has no standing to do so, because he can assert a claim only on the basis of his own damages, not on the basis of damages suffered by

others. This statement merely acknowledges basic rules of standing. Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663 (1962); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100, 60 L.Ed.2d 66 (1979); Mackey v. Nationwide Ins. Co., 724 F.2d 419, 421-22 (4th Cir. 1984).

Additionally, although not discussed in the Eighth Circuit opinion, even if the necessary elements of a prohibited retaliation claim had been met, Evans' 42 U.S.C. § 1981 claim against the School District could not have served as the basis for the damages awarded by the District Court. Section 1981 does not provide an independent federal damages remedy for discrimination by local governmental entities.

This Court has specifically held that 42 U.S.C. 1983 provides the exclusive federal damages remedy for the violation of rights guaranteed by § 1981 when the alleged violation is by a state entity. Jett v. Dallas Independent School District, 491 U.S. 701, 733 (1989). The School

District, a state entity, could not be subject to damages under § 1981 on a theory of respondeat superior, the theory pursued by petitioner.

III. THE EIGHTH CIRCUIT'S DECISION IS IN HARMONY WITH DECISIONS OF OTHER CIRCUITS AND HOLDINGS OF THIS COURT.

Petitioner's claims that the Eighth Circuit's decision is in conflict with decisions of other circuits and that it "undermines traditional civil rights protection" also flow from his distortion of the Eighth Circuit holding. None of the cases cited by Petitioner are in conflict with the Court's actual holding.

A. The Eighth Circuit's Ruling Does Not Conflict With Rulings Of Other Circuits Regarding The Elements Of A Cause Of Action Based On Employment Retaliation.

Petitioner has identified no decision which is in conflict with the Eighth Circuit's holding that Title VII

requires a showing of a reasonable belief that an unlawful employment action has occurred. Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346 (9th Cir. 1984), the case cited as establishing a conflict, does not deal with this issue.

In Wrighten, the Ninth Circuit had not been called upon to determine whether an unlawful employment practice had occurred. The trial court's finding that an unlawful employment practice had occurred was not challenged on appeal:

> In this action the trial court assumed without proof that Wrighten directed her opposition at unlawful employment practices at Emannuel Hospital.

726 F.2d at 1355.

The question before the Ninth Circuit was whether Wrighten's activities in opposition to an unlawful employment practice were so unreasonable as to exceed

the protection afforded by § 2000e-3; whether the employee's means of opposition to an unlawful employment practice was so extreme as to exceed the protection of Title VII. The trial court had denied the claim on the basis of the unreasonableness of the plaintiff's activities; the Ninth Circuit reversed, holding that the nurse's opposition activities did not go so far as to exclude her from § 2000e-3's protection.

The Eighth Circuit holding at issue herein does not address the reasonableness of Evans' means of opposition; it deals with whether the opposition was directed at an unlawful employment practice. The two decisions are not in conflict.

B. The Eighth Circuit's Denial Of Petitioner's Claim Under 42 U.S.C. § 1981 Was Consistent With Established Law.

Nor is the Eighth Circuit's denial of Evans' 42 U.S.C. § 1981 claim in conflict with the cases relied on by petitioner. In DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975), the plaintiff had been forced into retirement because he had sold his house to a black fellow-employee. 511 F.2d at 312. The employer had engaged in an action which was unlawful under § 1981 -- refusing to allow a black employee to make a contract similar to that allowed to white employees -- and the complaining employee had been directly damaged because of his action in opposition to this unlawful act of the employer. The white plaintiff had been denied standing based on the trial court's holding that a white person did not have standing to sue under § 42 U.S.C. 1981. Evans raises no such issue. The decision is not in conflict with DeMatteis.

Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975), and Sullivan v. Little Hunting Park, 396 U.S. 220, 90 S. Ct.

400. 24 L.Ed.2d 386 (1969) are also inapposite to the Eighth Circuit decision in this case. In Faraca, a white plaintiff was denied employment because he was married to a black woman. He had standing to raise a claim under 42 U.S.C. § 1981 because he had been denied a right guaranteed by § 1981; the right to contract. He personally suffered direct damage as a result of the employer's racially discriminatory action toward him. The Evans decision is not inconsistent with Faraca.

In Sullivan, the plaintiff was granted standing to bring an action under 42 U.S.C. 1982 after he suffered damage for trying to vindicate rights of minorities which had been violated by actions made unlawful under 42 U.S.C. 1982. This Court held that Sullivan had standing to sue even though he was not the direct victim of the discriminatory practice, because the direct victims would otherwise have had no way to vindicate their rights.

Sullivan is not applicable to the facts or to the holding of the Evans case. The students whose rights Evans claims to have been trying to protect are members of the plaintiff class in Jenkins. The students and their parents are unquestionably more appropriate advocates of their rights than Evans. They not only have a means to vindicate these rights, they are part of a class action in which the proper means of vindicating their rights is an issue in ongoing litigation.

The Eighth Circuit's denial of Petitioner's 42 U.S.C. § 1981 claim is not inconsistent with this Court's decision in Sullivan.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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